Petition

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81-1697
No.

IN THE
Supreme Court of the United States
October Term, 1981

EDWARD W. MINTE COMPANY, INC.

and

TRAVELERS INSURANCE COMPANY,
Petitioners,

v.

DAVID F. MURPHY
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the application of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act increasing the seventy dollar ($70.00) per week maximum compensation rate was unconstitutionally applied retroactively to substantially impair the vested rights of Petitioners when Petitioners contracted in 1963 to provide excess benefits to individuals who were injured or disabled in jurisdictions not covered by the Longshoremen's and Harbor Workers' Compensation Act but who by private contract between the parties, agreed that injured workers would receive benefits at the same rate and on the same basis as an individual covered by the Longshoremen's and Harbor Workers' Compensation Act?

II. Whether the Petitioners have been unconstitutionally denied due process of law by the application of an amendment to a statute which occurred nine years after two private contracts were entered into when the intent of the parties is by law concluded to be that the law in existence at the time of contracting forms a part of the agreement?

Edward W. Minte Co. has no subsidiaries or affiliates.

Travelers Insurance Co. has the following subsidiaries or affiliates:

1. Travelers Insurance Co.
2. Travelers Indemnity Co.
3. Travelers Indemnity of Illinois
4. Travelers Indemnity of Rhode Island
5. Charter Oak Fire Insurance Co.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No.

EDWARD W. MINTE COMPANY, INC.

and

TRAVELERS INSURANCE COMPANY,
Petitioners,

v.

DAVID F. MURPHY
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Edward W. Minte Company, Inc., and Travelers Insurance Company, pray that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on October 9, 1981, and subsequent denial of appellant's petition (below) for rehearing and suggestion for rehearing *en banc* filed on December 15, 1981.

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland, not yet reported, appears in the Appendix hereto as do the opinion and decision of the United States Court of Appeals for the Fourth Circuit dated October 9, 1981, and the United States Court of Appeals for the Fourth Circuit's denial of appellant's petition (below) for rehearing and suggestion for rehearing *en banc*.

JURISDICTION

The Court of Appeals for the Fourth Circuit had jurisdiction pursuant to 28 U.S.C.A. § 1291. The judgment of the Court of Appeals was entered on October 9, 1981. The petition for rehearing and suggestion for rehearing *en banc* was denied on December 15, 1981, and this petition for certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

United States Constitution

Art I, Sec. 10 – No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or impairing the obligation of contracts, or grant any title of nobility.

Amend. 5. **Criminal actions – Provisions concerning Due Process of law and just compensation clauses** – No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of

a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amend. 14. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

District of Columbia Code:

§36-501. **Longshoremen's and Harbor Workers' Compensation Act made applicable to the District of Columbia.**

The provision of chapter 18 of Title 33, U.S. Code, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee or an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person.

United States Code, Title 33:

[Pre-amendment]

§906. **Time for Commencement of Compensation.**

(b) Compensation for disability shall not exceed $70 per week and compensation for total disability shall not be less than $18 per week: *Provided, however,* That if the employee's average weekly wages, as computed under section 910 of this title, are less than $18 per week he shall receive as compensation for total disability his average weekly wages.

[Post-amendment]

§906. **Time for Commencement of Compensation.**

(b)(1) Except as provided in subsection (c) of this section, compensation for disability shall not exceed the following percentages of the applicable national average weekly wage as determined by the Secretary under paragraph (3):

(A) 125 per centum of $167, whichever is greater, during the period ending September 30, 1973.

(B) 150 per centum during the period beginning October 1, 1973, and ending September 30, 1974.

(C) 175 per centum during the period beginning October 1, 1974, and ending September 30, 1975.

(D) 200 per centum beginning October 1, 1975.

(2) Compensation for total disability shall not be less than 50 per centum of the applicable national average weekly wage determined by the Secretary under paragraph (3), except that if the employee's average weekly wages as computed under section 910 of this title are less than 50

per centum of such national average weekly wage, he shall receive the average weekly wages as compensation for total disability.

(3) As soon as practicable after June 30 of each year, and in any event prior to October 1 of such year, the Secretary shall determine the national average weekly wage for the three consecutive calendar quarters ending June 30. Such determination shall be the applicable national average weekly wage for the period beginning with October 1 of that year and ending with September 30 of the next year. The initial determination under this paragraph shall be made as soon as practicable after October 27, 1972.

[Post-amendment]

§910. **Determination of Pay.**

(h)(1) Not later than ninety days after the date of enactment of this subsection, the compensation to which an employee or a survivor is entitled due to total permanent disability or death which commenced or occurred prior to enactment of this subsection shall be adjusted. The amount of such adjustment shall be determined in accordance with the regulations of the Secretary by designating as the employee's average weekly wage the applicable national average weekly wage determined under section 6(b) and (A) computing the compensation to which such employee or survivor would be entitled if the disabling injury or death had occurred on the day following such enactment date and (B) subtracting therefrom the compensation to which such employee or survivor was entitled on such enactment date; except that no such employee or survivor shall receive total compensation amounting to less than that to which he was entitled on such enactment date.

Notwithstanding the foregoing sentence, where such an employee or his survivor was awarded compensation as the result of death or permanent total disability at less than the maximum rate that was provided in this act at the time of the injury which resulted in the death or disability, then his average weekly wage shall be determined by increasing his average weekly wage at the time of injury by the percentage which the applicable national average weekly wage has increased between the year in which the injury occurred and the first day of the first month following the enactment of this section. Where such injury occurred prior to 1947, the Secretary shall determine, on the basis of such economic data as he deems relevant, the amount by which the employee's average wage shall be increased for the pre-1947 period.
§910(h)(2).

Fifty per centum of any additional compensation or death benefit paid as a result of the adjustment required by paragraphs (1) and (3) of this subsection shall be paid out of the special fund established under section 944 of this Act, and 50 per centum shall be paid from appropriations.

[Pre-amendment]

§914. **Payment of Compensation**

(m) The total money allowance payable to an employee as compensation for an injury under this chapter shall in no event exceed in the aggregate the sum of $24,000: *Provided,* That this limitation shall not apply to cases of permanent total disability or death: *and provided further,* That in applying this limitation there shall not be taken into account any amount payable under section 908(b) of this title for maintenance during rehabilitation or title for maintenance during rehabilitation or any amount of addi-

tional compensation required to be paid under this section for delay or default in the payment of compensation or any amount accruing as interest upon defaulted compensation collectible under section 918 of this title.
On October 27, 1972, the Act was amended and provided: §5(e), 86 Stat. 1245. Section 14 of such Act is amended by striking out subsection (m). §22, 86 Stat. 1263, provided: Amendments made by this Act shall become effective 30 days after the enactment of this Act.

[Post-amendment]

§ 944 **Special Fund**

(j) The proceeds of this fund shall be available for payments:

(1) Pursuant to sections 10 and 11 with respect to initial and subsequent annual adjustments in compensation for total permanent disability or death which occurred prior to the effective date of this subsection.

(2) Under section 8(f) and (g), under section 18(b), and under section 39(c).

(3) To repay the sums deposited in the fund pursuant to subsection (d).

(4) To defray the expense of making examinations as provided in section 7.

STATEMENT OF THE CASE

David F. Murphy, plaintiff below, sought specific performance in the trial court of a union and insurance contract which provided excess benefits alleging that the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act were applicable to said contracts and thus entitled him to additional benefits. The

Edward W. Minte Company, Inc. and Travelers Insurance Co. denied Murphy was entitled as alleged.

The parties moved for summary judgment before the trial court which ruled on the motions on January 29, 1981, granting summary judgment for respondent herein, Murphy.

The proceeding was then brought by Minte and Travelers for review of the decision, order and judgment entered in this case by the Hon. Shirley B. Jones, Judge of the United States District Court, Baltimore, Maryland, which granted in part and denied in part Murphy's motion for summary judgment. The United States Court of Appeals for the Fourth Circuit affirmed the District Court's opinion. A rehearing and suggestion for rehearing *en banc* filed by Minte and Travelers was denied and filed on December 15, 1981.

The instant action arises out of Murphy filing a complaint based upon diversity jurisdiction against Minte and Travelers seeking to recover additional contract benefits to which he claimed entitlement. The entitlement is predicated on a collective bargaining agreement between Local 890 of the International Brotherhood of Painters and Allied Trades (hereinafter referred to as the "Union") and Minte (hereinafter referred to as "Minte") and a workmen's compensation insurance contract between Minte and Travelers. The additional contract benefits claimed are based upon the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (1976), as adopted by the District of Columbia pursuant to D.C. Code Ann. § 36-501 *et seq.* (1973). The contracts between Minte and Travelers make reference to the law of the District of Columbia for a compensation case which was brought

before the Maryland Workmen's Compensation Commission for an injury which occurred in the State of Maryland.

On or about July 31, 1963, Murphy was employed by Minte and sustained an accidental personal injury during the course of his employment while working within the State of Maryland. On the date of the accident, Murphy was a member in good standing of the Union and was within the coverage afforded by the aforementioned collective bargaining agreement between the Union and Minte.

The contract entered into between the Union and Minte went into effect in 1963 and expired in 1966. The pertinent portions of the Union contract under Article 9 state as follows:

> **Section 1.** The Contractor shall carry workmen's compensation insurance and such other insurance as may be required by the laws of the District of Columbia and the states within the geographical jurisdiction of [the Union] . . . The Contractor further agrees to carry adequate liability and compensation insurance conditioned so that each journeyman and apprentice shall receive benefits *upon the basis* and at the same rate as provided under the District of Columbia Workmen's Compensation Commission, irrespective of where the injury or death occurs. [Emphasis added].
>
> **Section 2.** The Contractor agrees to furnish proof upon request . . . that he is in compliance with all laws governing liability to his employees, workmen's compensation, and any other laws

> now in effect or which may be enacted in the future for the benefit and protection of labor.

Minte and Travelers entered into a workmen's compensation insurance policy which ran from July 1, 1963, for the term of one year. The insurance contract provides in pertinent part:

> In consideration of the premium provided for herein, it is agreed that if any employee of this insured who is a member of the [Union] . . . is injured in the State of Virginia or Maryland . . . which would have rendered the insured liable for compensation payments under the District of Columbia Workmen's Compensation Law had the accident been sustained in the District of Columbia, the company agrees to voluntarily pay on behalf of the insured the difference between the compensation benefits . . . as provided by the (state) compensation law and such compensation benefits under the District of Columbia Workmen's Compensation Law.

Murphy was found to be totally and permanently disabled by the Maryland Workmen's Compensation Commission prior to 1972. He has received workmen's compensation benefits pursuant to Maryland law and the excess benefits pursuant to District of Columbia law effective at the time of injury at the rate of $70 per week pursuant to the union and insurance contracts.

The District of Columbia has adopted the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (1976), into its workmen's compensation law, D.C. Code Ann. § 36-501 (1973). In 1972, the Longshoremen's and Harbor Workers' Compensation Act was amended by Congress and the benefits

schedules were increased for workers who were or would in the future become totally and permanently disabled. Murphy has claimed that he is entitled to receive the increased benefits in accordance with the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act (alternatively referred to herein as "LHWCA" or the "Act").

Minte and Travelers admit they are liable to pay excess benefits under the Act as it existed and appeared in 1963 but deny that the retrospective aplication of the provisions of the 1972 amendment to the LHWCA should apply to private union and insurance contracts. Petitioners further assert that retrospective application of additional benefits provided by the 1972 amendment constitute an unconstitutional impairment of contracts and denial of due process of law. Further, Minte and Travelers assert that they could not be liable for the additional benefits, for had this case been brought within the District of Columbia, the Department of Labor would be responsible for such adjustments pursuant to 33 U.S.C. § 944(j) (Special Fund).

REASONS FOR GRANTING WRIT

I

TO RESOLVE CONFLICT BETWEEN RETROACTIVITY DETERMINATION MADE BY THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND PRIOR ESTABLISHED PRECEDENT FROM UNITED STATES SUPREME COURT

The United States Court of Appeals for the Fourth Circuit held in the present case, that the 1972 amendments to the LHWCA applied retroactively to the private insurance contract entered into in 1963 as it incorporated any future

amendments to the LHWCA. Minte and Travelers assert that the 1972 amendments were not a part of, contemplated or incorporated into a contract entered into in 1963.

As a general rule of statutory construction, no provision of a statute is to be construed so as to give it retroactive effect unless such intent clearly appears from the Act itself. 16A Am. Jur.2d *Constitutional Law* § 662 (1979). In *Miller v. United States,* 294 U.S. 435 (1934), this Court held that statutes are not to be given a retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose to do so plainly appears.

In *Greene v. United States,* 376 U.S. 149 (1962), the leading case dealing with retroactivity enunciated by the Court at the time the 1972 amendments to the LHWCA were passed by Congress, a government contractor's private employee had his security clearance withdrawn by the government, as a result of which he lost his position with the government contractor. At the time the security clearance had been revoked, there was in effect a 1955 Department of Defense directive which provided for monetary remuneration for loss of earnings resulting directly from the suspension of clearance where a final determination was made favorable to such employee.

When such a final determination had been made in his case, the employee asserted a claim under the 1955 directive for recoupment of his lost earnings. While the matter was still pending within the agency, a superseding directive was issued in 1960 which substantially altered the prior directive. The government contended that since the later directive was in force prior to a determination of the claim, it should be applicable and be applied retroactively.

This Court, in rejecting that contention, observed at 376 U.S. 149, 160:

> The first rule of construction is that legislation must be considered as addressed to the future, not to the past . . . [and] a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be the unequivocal and inflexible import of the terms, and the manifest intention of the legislature . . .

See also Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268 (1969); *Claridge Apartment Co. v. Commissioner of Internal Revenue,* 323 U.S. 141 (1944).

The United States Court of Appeals for the Fourth Circuit and United States District Court for the District of Maryland totally ignored this precedent and applied the reverse test. In other words, in 1972, when Congress increased benefits payable pursuant to 33 U.S.C. § 906(b) and incorporated such adjustments pursuant to 33 U.S.C. § 910(h), the state of the law from this Court was such that unless there was a clear indication to the contrary, a statute was to be applied prospectively only; yet based on its interpretation of the LHWCA, the United States District Court for the District of Maryland and United States Court of Appeals for the Fourth Circuit expressly prohibited a prospective application and mandated the section 10(h)(2) adjustments be applied retroactively to private contracts. Minte and Travelers assert this contention is patently in conflict with the precedents of this Court, and contrary to Congressional intent as demonstrated by the provision assessing the adjustments against the Special Fund, 33 U.S.C. § 944, and Department of Labor rather than against private employers or insurers. [*See* IV, *infra*)].

II

TO RESOLVE CONFLICT BETWEEN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT'S DECISION UPON A FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH PRECEDENT ESTABLISHED WITHIN THE DISTRICT OF COLUMBIA AND THE STATE OF MARYLAND

At the time the collective bargaining agreement was entered into in 1963, D.C. Code Ann. § 36-501 was in effect. The legislative history of the District of Columbia Code H.R. REP. NO. 1422, 70th Cong., 1st Sess. 7498 (1928), S. REP. NO. 852, 70th Cong., 1st Sess. 6809 (1928), makes no mention of any retroactive effect. It is clear there have been amendments to the LHWCA which have been held not to have retroactive effect and are so considered in the District of Columbia despite the existence of D.C. Code Ann. § 36-501. *See, e.g., Rios v. Empresas Lineas Maritimas Argentinas v. Fred Imbert, Inc.*, 575 F.2d 986 (1st Cir. 1978); *Drachenberg v. Canal Barge Co., Inc.*, 571 F.2d 912 (5th Cir. 1978); *Addison v. Bulk Food Carriers, Inc.*, 489 F.2d 1041 (1st Cir. 1974).

The law in the District of Columbia specifically holds that the laws in existence at the time a contract was entered into form a part of the contract as if the same was fully set forth therein. "It is to be accepted that laws which subsist at the time and place of the making of a contract and where it is to be performed enter into and form a part of it as if they were expressly referred to or incorporated in its terms." *Maryland-National Capital Park and Planning Commission v. Lynn*, 514 F.2d 829, 833 (D.C. Cir. 1975). This is in accordance with the law as espoused by this Court in *Wood v. Lovett*, 313 U.S. 362 (1941), and the vast majority of jurisdictions throughout the country. *See* 17 Am. Jur.2d *Contracts* § 257 (1964), and the cases cited therein, *see also Hendrickson v. Apperson*, 245 U.S. 105

(1917) [holding when a contract becomes consummated, the existing law defines the duties and rights of the parties].

The insurance and union contracts in the present instance were for specific periods of time to wit, one and three years respectively. That is to say, the insurance contract covered Minte for the period of July 1, 1963, up to July 1, 1964. The union contract was binding upon the Union and Minte for the period of 1963 to 1966. During this time, the LHWCA, 33 U.S.C. § 901 *et seq.*, as adopted by the District of Columbia pursuant to D.C. Code Ann. § 36-501 *et seq.*, remained the same in terms and the amount of maximum weekly benefits paid to an injured employee. In fact, the $70 per week maximum was not changed until the amendment to the Act in 1972. Therefore, it is clear that the law which existed at the time the union and insurance contracts were negotiated and executed (1963) provided for a maximum weekly benefit under the Act of $70 per week.

The law in the State of Maryland, *See Denice v. Spotswood I. Quimby, Inc.*, 258 Md. 416, 237 A.2d 4 (1968), is in accordance with the majority rule of construction and it is well established law in the State of Maryland that:

> Generally, unless a contract provides otherwise, the law applicable thereto at the time and place of its making, including constitutional and statutory provisions as judicial precedent, is as much a part of the contract as though it were expressly referred to and incorporated in its term; and the same is true of a law of the place where it is to be performed. The reason for this rule ordinarily is that it is presumed that the parties had such law in contemplation when the contract was made . . .

. . . .

> Every contract is made with reference to, and subject to, existing law and every law affecting the contract is read into and becomes a part of the contract. . .
>
> . . . .
>
> It is a familiar principal often applied in the cases . . . the laws which subsist at the time and place of making of a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its term; and this rule embraces alike those which effect its validity, construction, discharge and enforcement.

237 A.2d 4, 6, 8 (1968).

This is also consistent with the well-known maxim of law that when a contract is ambiguous, the intent of the parties at the time it was entered into control the interpretation of the contract. It is a familiar principle that constitutional and statutorial provisions in effect at the time a contract is made become a part of the contract. This holding comports with the rule of statutory construction and constitutional law that disfavors a construction which will impair existing rights and/or obligations of existing contracts or will affect the retroactive application of a statute. *Kramer v. Kramer,* 226 Md. App. 620, 339 A.2d 329 (1975).

It is, therefore, clear that the $70 maximum compensation rate pursuant to 33 U.S.C. § 906(b), as it existed in 1963, formed a part of the insurance and union contract at issue in the instant case.

The decision and order of the United States District Court for the District of Maryland and United States Court of Appeals for the Fourth Circuit is directly in con-

tradiction to the United States Court of Appeals for the District of Columbia Circuit in the case of *Hastings v. Earth Satellite Corporation,* 628 F.2d 85 (D.C. Cir. 1980). In *Hastings,* the case dealt with a claim brought within the District of Columbia under the District of Columbia Workmen's Compensation Act. The Court in that case interpreted the Act and applied a retroactive application of the $24,000 maximum compensation payable pursuant to 33 U.S.C. § 914(m) of the Act. However, it must be noted with great interest that the $70 per week payment of compensation figure pursuant to 33 U.S.C. § 906(b) was maintained and upheld by the Court for temporary total and permanent partial disability benefits. *Id.* at 87.

It should be further noted that 33 U.S.C. § 914(m) refers to the Act as it existed prior to the 1972 amendments. The $70 per week maximum compensation payable refers to 33 U.S.C. § 906(b) of the Act prior to the 1972 amendment. Thus, it is clear that although *Hastings, supra,* 628 F.2d 85, removed the limitation on the amount of compensation which can be payable during the course of the claimant's life, it did not remove the limitation of $70 per week for disability incurred prior to the 1972 amendment to the LHWCA. Therefore, had Murphy brought his case within the District of Columbia, he could recover no more than $70 per week for permanent partial disability and no more than $70 per week from the employer and carrier for permanent total disability. Any amount above the $70 per week maximum compensation payable by the employer and carrier would be payable pursuant to 33 U.S.C. § 910(h)(2) and thus, fifty percent of the adjustments would be payable by the Special Fund pursuant to 33 U.S.C. § 944 and fifty percent by appropriations. When one reviews the entire legislative history surrounding the 1972 amendments including the

abundant testimony and proposals made at the congressional hearings, plus the committee reports and floor discussion, one can find nothing whatsoever to support the idea that when Congress increased the weekly benefits paid pursuant to the Act, it intended that the change apply to pre-amendment injuries like Murphy's. *See* Hearings before the Select Subcommittee on Labor of the Committee on Education and Labor, 92nd Cong., 2nd Sess. on H.R. 247, H.R., 3505, H.R. 12006 and H.R. 15023 (1972); Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare, 92nd Cong., 2d Sess. on S. 2318, S.525, and S.1547 (1972); 118 Cong. Rec. pp. 30397, 30670-74, 36265-74, 36390-96.

In view of the significant impact which would occur on pending pre-amendment injuries, it is clear that if Congress had intended such a far-reaching result, Congress would have addressed the issue in the legislative history and intent regarding the 1972 amendments.

The Honorable Shirley B. Jones of the United States District Court for the District of Maryland clearly distinguished the instant case from death benefits cases arising under 33 U.S.C. § 909 of the Act wherein it has been consistently held that the maximum amount payable for death benefits is to be applied retroactively. A cause of action for a death claim arises at the time of death, thus, it accrues after the amendments to the LHWCA when the employee is injured before 1972 but dies after 1972 as compared to the instant case where the private union and insurance contracts were entered into nine years prior to any change in the LHWCA. Contemplation of changes in weekly benefits could not have been within the minds of the parties to the contract, given the fact that Congress did not discuss the same until 1972.

In connection with amendments to workmen's compensation statutes, it is noted in 81 Am. Jur.2d. *Workmen's Compensation* § 34 (1976) as follows,

> In harmony with the established principle that legislative enactments, in the absence of a clearly expressed intent to the contrary, will be deemed to be prospective, and not retrospective, workmen's compensation acts have been held not to apply to injuries which occurred before the law went into effect. On the same principle, it is held that an amendment of the statute in respect of a matter of substantive right does not apply to existing injuries or to claims arising by reason of the prior death of an injured employee. Neither can a curative statute be made applicable to claims for compensation occurring prior to the enactment thereof.

The prospective application of other amendments to the Act since their amendment in 1972 fixing the parties' rights as of the date of the injury can be found in *Rios v. Empresas Lineas Maritimas Argentinas v. Fred Imbert, Inc.*, 575 F.2d 986 (1st Cir. 1978); *Drachenberg v. Canal Barge Co., Inc.*, 571 F.2d 912 (5th Cir. 1978); *Uglem v. Foss Launch & Tug Co.*, 541 F.2d 1378 (9th Cir. 1976); *Murphy v. Woods Hole, Martha's Vineyard & Nantucket SS Auth.*, 545 F.2d 235 (1st Cir. 1976); *Addison v. Bulk Food Carriers, Inc.*, 489 F.2d 1041 (1st Cir. 1974); *Yochim v. Likes Bros. SS Co. Inc.*, 444 F. Supp. 6 (D.La. 1977); and *Scalafini v. Moore, McCormack Lines, Inc.*, 388 F. Supp. 897 (D.N.Y. 1975). In *Bell v. Isthmian Lines, Inc.*, 363 F. Supp. 156, 159 (D.Fl. 1973), the court observed:

> Further evidence of Congressional intent that the section is to be applied prospectively is the fact that the amendments also improved the

benefit structure of the Act. The maximum benefit amounts were increased, along with other changes in calculation of benefits and survivor benefits.

In summary, it is respectively urged that there is no legislative support that Congress intended to increase the $70 maximum benefits payable per week prior to 1972 or that the increase be applied retrospectively to injuries occurring prior to the 1972 amendments especially to employers and insurers. Further, the decision of the United States Court of Appeals for the Fourth Circuit and the United States District Court for the District of Maryland is not in accordance with state law and conflicts with precedent of the United States Circuit Court for the District of Columbia. In addition, retroactive application of this portion of the statute will have a substantial impact on numerous claims pending under the same or similar excess benefits contracts.

III

WRIT SHOULD BE GRANTED TO RESOLVE AN UNCONSTITUTIONAL IMPAIRMENT OF CONTRACTS BY A UNITED STATES DISTRICT COURT'S INTERPRETATION THAT AMENDMENTS TO THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT WERE RETROACTIVELY APPLICABLE TO PRIVATE CONTRACTS BETWEEN A UNION, AN EMPLOYER, AN INSURANCE CARRIER, AND TO IMPAIR SAID CONTRACTS WOULD BE A DENIAL OF DUE PROCESS OF LAW

This Court has long held that where the result of a statutory change will be to impair contracts or vested rights, a construction is to be avoided which will give it retrospective operation. *Moultrie County v. Rockingham Ten-Cent Savings Bank,* 92 U.S. 631 (1876); *McClurg v. Kingsland,* 1 Howard (U.S.) 202 (1843). Numerous state

and federal courts applying the traditional test outlined by this Court have consistently followed this Court's lead in holding that increases of substantial monetary benefits created after the date of the injury are in violation of Art. 1, § 10 of the United States Constitution, if applied retrospectively. *See, e.g., Barrick v. District of Columbia,* 173 A.2d 372 (D.C. App. 1961); *Cupo v. District of Columbia,* 285 A.2d 696 (1972). In *Cooper v. Wicomico County, Department of Public Works,* 278 Md. 596, 366 A.2d 55 (1976), a worker was injured in 1969 and the Maryland Commission awarded permanent and total disability benefits at the appropriate weekly rate not to exceed $30,000 in total, the maximum payable at that time under the Maryland Act. In 1973 the Maryland Legislature increased the ceiling to $38,397 for pre-amendment permanent total injuries and also increased the weekly maximum rate.

This retroactive legislation was challenged; the Court of Appeals of Maryland in *Cooper* (II), 398 A.2d 1237 (1979), concluded that despite the clear legislative intent to make these benefits retroactive, a retroactive application was unconstitutional because it adversely affected the impairment of contract and vested rights provisions of the Constitution. The Court's analysis in *Cooper* (I), *supra,* 366 A.2d 55, 57, 58, addressing these issues in relying in part on Supreme Court precedent was as follows:

> We think the lower court was correct if the operational effect of ch. 832 requires an employer or insurer to pay more than it was required to pay under the law in effect at the time of the injury. It is generally held that the basis of a compensation award is contractual and that the amount payable thereunder by an employer or insurer cannot be increased retrospectively.

In *State Industrial Commission v. Nordenholt Corp.*, 259 U.S. 263 (1922) this Court stated:

> "An award under the workmen's compensation law is not made on the theory that a tort has been committed; on the contrary, it is upon the theory that the statute giving the commission power to make an award is read into and becomes a part of the contract . . . The contract of employment, by virtue of the statute, contains an implied provision that the employer, if the employee be injured, will pay to him a certain sum to compensate for the injuries sustained, or if death results, a certain sum to dependents . . . It is a part of the compensation agreed to be paid for services rendered in the course of the employment."

To the same effect in *Bradford Electric Light Co. v. Clapper,* 286 U.S. 145 (1932) the Court stated "for the purpose of the act, as of the workmen's compensation laws of most other states, is to provide . . . not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinate." *See also Magnolia Petroleum Co. v. Hunt,* 320 U.S. 430 (1944), holding that a workmen's compensation award which has become final is entitled to the same full faith and credit as a judgment of a court, so that another state may not increase that judgment for the same injury.

. . . .

A number of courts throughout the county have held that to give effect to a legislative enactment increasing the amount payable to an employee to a sum greater than that payable at

> the time of the injury would impermissibly alter the substantial term of an existing contract between an employee and an employer (and derivatively as to an insurer). *See,* for example, *Loveless v. State Workmen's Compensation Commissioner,* 155 W.Va. 264, 184 S.E.2d 127 (1971); *Lyon v. Wilson,* 201 Kan. 768, 443 P.2d 314, 319 (1968); *Noffsker v. K. Barnett & Sons,* 72 N.M. 471, 384 P.2d 1022 (1963); *Mitchell v. United States Fidelity and Guaranty Co.,* 206 F. Supp. 489 (E.D. Tenn. 1962). *See also Preveslin v. Derby & Ansonia Developing Co.,* 112 Conn. 129, 151 A. 518 (1930).

Any legislation which purports to change a substantial term of a contract operative at the time of a claimant's injury serves to impair the obligation of such contract in contravention of the Constitution of the United States. 81 Am. Jur.2d *Workmen's Compensation* § 18 (1976); 16A Am. Jur.2d *Constitutional Law* § 682 (1979). An impairment may be shown if new burdens are imposed which materially increase or decrease the value and benefits of the contract. 16A Am. Jur.2d *Constitutional Law* § 697 (1979).

In *Preveslin v. Derby & Ansonia Developing Co.,* 112 Conn. 129, 151 A. 518 (1930), the Court held that an attempt to retroactively apply increased benefits violated not only the impairment contract provisions of Art. 1, § 10 of the United States Constitution, but also the vested rights protection of the Fourteenth (14th) Amendment. Similar holdings may be found on one or both bases in *Yaeger v. Delano Granite Works,* 250 Minn. 303, 84 N.W.2d 363 (1957); *McClung v. National Carbon Co.,* 190 Tenn. 202, 228 S.W.2d 488 (1950); *General Refractories Co. v. Henderson,* 313 Ky. 613, 232 S.W.2d 846 (1950); *State ex*

rel. Conley v. Pennybacker, 131 W.Va. 442, 48 S.E.2d 9 (1948); *Salmon v. Denhart Elevators,* 72 S.D. 110, 30 N.W.2d 644 (1948); *Thomas v. Crummies Creek Coal Co.,* 297 Ky. 210, 179 S.W.2d 882 (1944); *Washabaugh v. Bartlett Collins Glass Co.,* 177 Okla. 159, 57 P.2d 1162 (1936); *Swatek Construction Co. v. Williams,* 177 Okla. 305, 58 P.2d 585 (1935); *Warner v. Zaiser,* 184 Minn. 598, 236 N.W. 761 (1931); *Gauthier v. Penobscot Chemical Fiber Co.,* 120 Me. 73, 113 A. 28 (1921); *In re Beausoleil's Case,* 321 Mass. 344, 73 N.E.2d 461 (1947). An extended discussion and analysis coming to the same conclusion is found in *Tennessee Coal & Iron Div., U.S. Steel Corp. v. Hubbert,* 110 So.2d 260 (Ala. 1959), which relied in part on *P.J. Carlin Construction Co. v. Heaney,* 299 U.S. 41 (1936). Also see 73 Am. Jur.2d *Statutes* § 378 (1974).

In *Mitchell v. U.S. F. & G. Co.,* 206 F. Supp. 489 (D. Tenn. 1962), the Court stated:

> The right of an injured employee to compensation benefits arises from his contractual relationship with his employer existing at the *time* of his injury, and the statute *then* in force forms a part of the contract and determines the substantive rights and obligations of the parties [citation omitted]. To the extent that Workmen's Compensation statutes do form a part of the contractual relationship between an employee and his employer, the Constitution of the United States prohibits the enacting states from impairing the obligation of such contracts [emphasis added] -*Cf. Phillips v. City of West Palm Beach,* 70 So.2d 345 (Fla. 1935); *Salmon v. Denhart Elevators,* 72 S.D. 110, 30 N.W.2d 644 (1948).

Although the foregoing decisions involve Art. 1, §10 of the United States Constitution and the Fourteenth Amendment, which address actions by the states, the Fifth Amendment due process guarantee similarly applies to federal legislation. 16 Am. Jur.2d *Constitutional Law* § 700 (1979); *Fleming v. Nestor,* 363 U.S. 603, 611 (1960); *John McShain, Inc. v. District of Columbia,* 92 U.S. App. D.C. 358, 205 F.2d 882 (1953); *Johnson v. United States,* 111 Ct.Cl. 750, 79 F. Supp. 208, 211 (1948); *Miller v. Howe Sound Mining Co.,* 77 F. Supp. 540 (D.C. Wash. 1940); *Trozze v. Drooney* 232 N.Y.S.2d 139, 35 Misc.2d 1060 (1962).

The Fifth Amendment protects vested rights and prohibits those rights from being destroyed, divested or impaired by direct Congressional legislation. *Deutsche Bank Und Discoto-Gesselschaft v. Cummings,* 65 App. D.C. 296, 83 F.2d 554 (1936).

In 1972 amendments to the Act could not be constitutionally applied to Minte's policy with Travelers, for to do so would be to increase Travelers' obligation under the original compensation award and it would amount to denying Travelers' due process of law. This is the rule in Maryland and it is the majority rule elsewhere within the United States. *See, e.g., Harris v. National Truck Service,* 321 So.2d 690 (1975); *Warner v. Zaiser,* 184 Minn. 598, 236 N.W. 761 (1931); *Bethlehem Shipbuilding Corp. v. Mullen,* 2 W.W.Harr. 55, 119 A. 314 (1922); *Riggs v. Lehigh Portland Cement Co.,* 76 Ind. App. 308, 131 N.E. 231 (1921); *Reggep v. London Shoe Products Corp.,* 241 A.2d 802 (Me. Sup. 1968); *Aetna Casualty and Surety Co. v. Industrial Accident Commission,* 30 Cal.2d 388, 181 P. 159 (1947); *Casieri's Case,* 286 Mass. 50, 190 N.E. 118 (1934).

As stated in *Harris v. National Truck Service,* 321 So.2d 690:

> Because the employer and employee have implicitly contracted to abide by any compensation scheme in effect at the moment of injury, any attempt to amend the compensation schedule after the injurious action could have no bearing on an award given, and if such retrospective application is given the amendment, then an unconstitutional impairment of contract obligation occurs.

Further, as stated at 82 A.L.R. 1244 (1933),

> As regards an injured employee, the time to be considered in determining whether a case is within the earlier or later provisions of the Workmen's Compensation Act in relation to the compensation recoverable is the time of the injury. The right of the employee to compensation arises from the contractual relation between him and his employer existing at that time, and the statute then in force forms a part of the contract of employment and determines the substantive right and obligation of the parties. No subsequent amendment in relation to the compensation recoverable can operate retrospectively to effect in any way the rights and obligations prior thereto fixed.

To permit the United States Court of Appeals for the Fourth Circuit's decision to stand in clear conflict with this Court's prior announcements is to cast into doubt not only what Congress must or must not say with respect to future legislation but would also have the same chaotic effect on current or proposed state legislation. This should not be permitted to occur where the result surely will be to cast doubt and uncertainty on legislation and will spawn future

litigation ad infinitum. This Honorable Court should act now to clarify this situation so as to insure uniformity in administration of the Longshoremen's and Harbor Workers' Compensation Act in view of the United States District Court for the District of Maryland and the United States Court of Appeals for the Fourth Circuit's decisions which are contrary to a federal statute's intent.

IV.

WRIT SHOULD BE GRANTED TO RESOLVE AN UNCONSTITUTIONAL APPLICATION OF THE 1972 AMENDMENTS TO THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT TO PRIVATE CONTRACTS INVOLVED HEREIN AS MINTE WOULD NOT HAVE BEEN RESPONSIBLE FOR ADJUSTMENTS HAD THE CLAIM BEEN BROUGHT IN THE DISTRICT OF COLUMBIA AND TO INCREASE THE BENEFITS WHICH HAD BEEN PRIVATELY CONTRACTED FOR IS CONTRARY TO THE INTENT OF CONGRESS WHEN IT PASSED THE 1972 AMENDMENTS TO THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

The 1972 benefit adjustments to the Act are not payable by an employer or carrier if the claim had been brought within the District of Columbia. The adjustments are payable pursuant to 33 U.S.C. § 910(h)(2) which states "fifty per centum of any additional compensation or death benefits paid as a result of the adjustments required by paragraphs (1) and (3) of this subsection shall be paid out of a special fund established under section 44 of this Act and fifty per centum shall be paid from appropriations."

Section 944(j) of the Act states:

> The proceeds of the fund shall be available for payment:

(1) Pursuant to section 10 and 11 with respect to the initial and subsequent annual adjustments in compensation for total permanent disability.

If the United States District Court for the District of Maryland and the United States Court of Appeals for the Fourth Circuit's logic regarding the intent of the parties at the time of contracting included retroactively applying the 1972 amendment, then it logically follows that the parties intended that 33 U.S.C. § 910(h)(2) and 33 U.S.C. § 944(j) enacted in 1972, would also apply to the contracts entered into in 1963.

The parties to the contracts in 1963 obviously knew there was a $70 maximum compensation rate in the District of Columbia at the time the contracts were entered into. The parties contracted that Minte would provide "benefits upon the same *basis* . . . as those provided under the District of Columbia Workmen's Compensation Commission." (Emphasis added.) This "basis" was the $70 maximum of compensation which has been applicable to employers and carriers in the District of Columbia for permanent total disabilities arising from injuries occurring before 1972. No court, administrative law judge, commission or administrative body has ever required an employer to pay adjustments pursuant to 33 U.S.C. § 910(h). It cannot now be expected that Minte would have intended to pay such adjustments. Further, Minte could not be liable for them today in the District of Columbia. Moreover, this is especially important given the fact Murphy became permanently and totally disabled prior to 1972 and thus, all rights became fully vested prior to the amendments in 1972.

Travelers and Minte contracted so that Travelers would be liable if an employee was injured in Maryland or

Virginia "which would have rendered the insured liable for compensation payments under the District of Columbia Workmen's Compensation Law had the accident been sustained in the District of Columbia. . ." Since Murphy was injured in Maryland, Minte would be liable for those compensation benefits it would have had to pay had it been a District of Columbia claim. Minte was not and never would have been required to pay more than $70 per week, the maximum compensation rate in 1963. Travelers insured Minte against whatever loss it might suffer but in no event agreed to pay more than Minte would have been liable for if the case had been brought in the District of Columbia.

The wording of the union and insurance contracts make clear that neither Minte, Travelers or the Union intended that the employer and carrier be liable for any sum greater than that which they would have been liable had this case been brought in the District of Columbia. The subsequent change in 33 U.S.C. § 910(h) and 33 U.S.C. §944 makes clear that the employer and carrier will not be liable for any sum greater than the $70 maximum compensation rate. Thus, it is clear that Minte and Travelers cannot be found liable for the additional benefits claimed by Murphy as the result of the 1972 amendments.

CONCLUSION

For all the reasons set forth above, it is respectfully submitted a Writ of Certiorari be granted.

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Appendix

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

DAVID F. MURPHY,	:	
	:	
Plaintiff	:	
	:	
vs.	:	**Civil Action**
	:	**No. J-79-1500**
EDWARD W. MINTE COMPANY	:	
INC. and TRAVELERS	:	
INSURANCE COMPANY,	:	
	:	
Defendants		

MEMORANDUM AND ORDER

David F. Murphy has filed this diversity action against Edward W. Minte Co. (Minte) and Travelers Insurance Company (Travelers). He seeks to recover additional insurance benefits to which he claims he is entitled under a collective bargaining agreement between Local 890 of the International Brotherhood of Painters and Allied Trades (the Union) and Minte, and a workmen's insurance contract between Minte and Travelers.

The facts here are essentially undisputed. In 1963 the Union, of which plaintiff was a member, and Minte entered into a three-year collective bargaining agreement. Among its terms were the following provisions:

> *Section 1.* The Contractor shall carry Workmen's Compensation Insurance and such other insurance as may be required by the laws of

> the District of Columbia and the States within the geographical jurisdiction of [the union] . . . The Contractor further agrees to carry adequate liability and compensation insurance conditioned so that each journeyman and apprentice shall receive benefits upon the basis and at the same rate as provided under the District of Columbia Workmen's Compensation Commission, irrespective of where the injury or death occurs.
>
> *Section 2.* The Contractor agrees to furnish proof upon request . . . that he is in compliance with all laws governing liability to his employees, Workmen's Compensation, and any other laws now in effect or which may be enacted in the future for the benefit and protection of labor.

Minte, in turn, sought workmen's compensation insurance from Travelers, and there is no dispute that the policy was intended to pay whatever sums Minte was obligated to pay under the collective bargaining agreement. An insurance contract was issued effective July 1, 1963,[1] for a term of one year. On July 31, 1963, plaintiff was injured while employed by Minte in the State of

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[1]The insurance contract provides:

> In consideration of the premium provided for herein, it is agreed that if any employee of this insured who is a member of the [Union] . . . is injured in the state of Virginia or Maryland. . . which would have rendered the insured liable for compensation payments under the District of Columbia Workmen's Compensation law had the accident beeen sustained in the District of Columbia, the company agrees to voluntarily pay on behalf of the insured the difference between the com ensation benefits. . . as provided by the [State] Compensation Law and such compensation benefits under the District of Columbia Workmen's Compensation Law.

Maryland. The Maryland Workmen's Compensation Commission found him to be permanently and totally disabled. He has received workmen's compensation benefits pursuant to Maryland law and the union and insurance contracts up to the present time of $70 per week.

The District of Columbia has adopted the benefit provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, into its workmen's compensation law, D.C. Code § 36-501, in such a way that D.C. benefits automatically increase when Congress raises benefits under the LHWCA. In 1972 the Act was amended by Congress and the benefit schedules were increased for workers who were then or would in the future become permanently and totally disabled.

Plaintiff contends that he is entitled to receive increased benefits in accordance with the 1972 amendments to the Act. The defendants admit that they are liable to pay excess benefits under the Act as it applied in 1963, but deny that the retrospective provisions of the 1972 amendments to the Act apply to these contracts. They also assert that the retrospective application of additional benefits required by the 1972 amendments constitutes an unconstitutional impairment of contract. Alternatively, they state that the retroactive benefit adjustments are payable by the Department of Labor from a special fund created under the LHWCA. Finally, defendants assert that plaintiff's claim is barred by the statute of limitations, the cause of action accruing at the time of passage of the 1972 amendments. Plaintiff's motion for partial summary judgment and defendants motion for summary judgment are now before this Court, raising these issues.

Since it is clear that the insurance policy was intended to enable Minte to perform its obligation under the collective

bargaining agreement, the most important question to be resolved is whether that contract covers the retroactive increases. In a diversity case, where there is a conflict of laws, this Court must look to the law of the forum to determine which law it will apply. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941). For matters of contruction of the terms of a contract, Maryland applies the law of the place of contracting. *E.G., Macubin v. Curtiss-Wright Corp.*, 190 Md. 52, 57, 57 A.2d 318, 321 (1948); *Union Trust Co. v. Knabe,* 122 Md. 584, 608, 89 A. 1106, 1115 (1914). It did not appear from the record where the contract was executed, and this Court requested that the parties submit that information. Counsel reported that because of the 17-year interval since execution, they were unable to establish the place of execution. Although it appears most likely that the contract was signed in Washington, D.C., where the employer and the Union had headquarters, there is agreement that the place of execution was either the District of Columbia or Maryland. Fortunately, both jurisdictions have similar rules of contract interpretation.

This Court must first look to the language of the contract. Section 1 of Article IX states that Minte agrees to carry excess compensation insurance "conditioned so that each journeyman and apprentice shall receive benefits upon the basis and at the same rate as provided under the District of Columbia Workmen's Compensation Commission." In section 2 the employer agreed to furnish proof of compliance "with all laws governing liability to his employees, workmen's compensation, and any *other* laws now in effect or which may be enacted in the future for the benefit and protection of labor." (Emphasis supplied). Plaintiff urges that this clause demonstrates the parties' intent that future changes in workmen's compensation laws would be incorporated in the contract. This Court does

not think the clause bears this interpretation. The standard for interpreting an ambiguous term of a contract is what a reasonable person in the position of the parties would have thought it meant. 1901 *Wyoming Co-op Ass'n v. Lee,* 345 A.2d 456 (D.C. App. 1975); *Patuxent Development Co. v. Ades of Lexington, Inc.,* 257 Md. 398, 263 A.2d 584 (1970). Even if this clause can be considered ambiguous, the reasonable interpretation of it is that the "future" clause refers to laws other than workmen's compensation.

The purpose of section 1 of the contract, reading the language as a reasonable person in the position of the parties would, was to put an employee of Minte injured in Maryland or Virginia in the same position as to workmen's compensation benefits as one injured in the District of Columbia. No mention is made of a specific rate of benefits, and no provision regarding future increases is made.

The statute in effect at the time of the contract provided:

> The provisions of Chapter 18 of Title 33, U.S. Code [the LHWCA], *including all amendments that may hereafter be made thereto,* shall apply in respect to the injury or death of an employee or employer carrying on any employment in the District of Columbia . . .

D.C. Code § 36-501 (emphasis supplied). This provision had been in effect since 1928.

The contract simply referred to D.C. workmen's compensation benefits with no qualification; the D.C. statute provides in very clear language for future amendments. Thus, the parties must be found to have contemplated, or at least taken a risk, that future amendments to the LHWCA would be made and would change the amounts payable under the contract. (The fact that such changes

might occur after the term of the contract expired must also be found to have been contemplated or at least risked, because of the nature of workmen's compensation benefits for permanent total disability, which continue for a worker's life.)

The question then arises whether the statute impairs the obligation of this contract. The defendant relies on the clause prohibiting impairment by the states, U.S. Const. art. I, § 10, on the theory that when the District of Columbia is acting as a state, that clause applies. Plaintiff correctly points out that it was Congress that originally enacted the provision of the D.C. Code that ties workmen's compensation benefits to the LHWCA. The impairment clause is applicable only to the states; however, there is authority based on the Fifth Amendment, that the federal government similarly may not impair the obligation of contract because doing so would, or could, constitute a deprivation of property without due process of law. *E.g., The Sinking Fund Cases,* 99 U.S. 700, 718 (1878). (It is obvious that the contract being found to have contemplated the type of change in the law involved here, the statute cannot be said to impair its obligation.) Even if the contract is not read as contemplating a retrospective increase, the statute cannot be said to impair its obligations. The 1972 amendments to the LHWCA have been challenged directly on impairment of contract/due process grounds by employers and their compensation insurance carreirs, and the constitutionality of various provisions has been upheld by several federal courts, including the Fourth Circuit. *E.g., State Ins. Fund v. Pesce,* 548 F.2d 1112 (2d Cir. 1977); *Norfolk, Baltimore & Carolina Lines, Inc. v. Director, Office of Workers' Compensation Programs,* 539 F.2d 378 (4th Cir. 1976); *American Stevedores, Inc. v. Salzano,* 538 F.2d 933 (2d Cir. 1976). The first two cases involved employees injured

prior to the 1972 amendments (whose subsequent unrelated deaths would not then have been compensable) who died after the 1972 amendments. The courts upheld the award of death benefits under the Act against arguments that application to workers injured before 1972 was a retrospective one, not clearly contemplated by the statute, that impaired the vested rights of employers and insurers. Although these cases can be distinguished on the ground that the right to death benefits accrues and thus vests only upon death, *American Stevedores v. Salzano* involved a worker injured prior to the Act who was awarded the increased benefits for permanent total disability. The United States Court of Appeals for the Second Circuit rejected the contention that the retroactive application was unconstitutional, simply noting that the "constitutionality of retroactive provisions in Workmen's Compensation type statutes is well established." 538 F.2d at 937. The case before us is two steps removed from the direct challenges in the cases noted above, in that it deals with a D.C. law incorporating the LHWCA and a contract incorporating the D.C. benefit schedules, but those differences do not change the nature of the impairment question presented. *This Court, accordingly, rules that the retroactive application of benefits at issue here is not unconstitutional.*

The defendants next argue that the compensation sought by the plaintiff should be payable from a fund set up by the Department of Labor to cover partially the effect of the 1972 amendments. 33 U.S.C. § 910(h)(2), § 944(2). The fallacy in this argument is that plaintiff is not entitled to benefits under the District of Columbia workmen's compensation law. Since he is not under that law, he cannot appropriate funds set up pursuant to that statute. Neither does the contract in the case *sub judice* allow plaintiff to avail himself of the fund.

Defendants' final argument is that plaintiff failed to file this action within the statute of limitations, and thus is barred from maintaining this suit. "Ordinarily, statutes of limitations are considered procedural in nature, and as to limitations, the law of the forum is to be applied." *Leonard v. Wharton,* 268 F. Supp. 715 (D. Md. 1967); *app. dism.* 396 F.2d 452 (4th Cir. 1968); *cert. denied,* 393 U.S. 1112 (1968). The applicable Maryland statute of limitations is three years. Md. Cts. & Jud. Proc. Code Ann. § 5-101 (1980) (present version same as that in effect in 1963 and thereafter).

Maryland law also provides that part payment of a contract debt is considered an acknowledgement. *McMahan v. Dorchester Fertilizer Co.,* 184 Md. 155, 40 A.2d 313 (1944); *Burgoon v. Bixler,* 55 Md. 384 (1881). The defendant has continued to pay the plaintiff sums due under the contract. The contract here, however, is analogous to ones providing for installment payments. *Defendant's obligation is to pay plaintiff a certain sum each week, indefinitely.*

Maryland follows the common law rule that the statute of limitations begins to run on a contract providing for installment payments when each installment is due. *Williams v. Taylor,* 99 Md. 306, 57 A. 641 (1904) (installment note); *Avery v. Weitz,* 44 Md. App. 152, 407 A.2d 767 (1979).

The amendments to the LHWCA were enacted November 26, 1972, and plaintiff had thereafter a cause of action for underpayment of each weekly installment. Although he could initially have probably maintained an action to adjudicate his present and future rights to the additional amounts claimed, each installment constitutes a breach and gives to a cause of action. Thus, plaintiff's entire claim is not barred because suit was not filed within three years of the date of enactment of the amendments.

His claim for all sums due prior to three years before the filing of this action in 1979 is barred, since each payments gave rise to a cause of action.

If the amount due is less than $10,000, this Court does not necessarily lack jurisdiction. The jurisdictional amount is determined as of the time of filing. If plaintiff's claim is asserted in good faith, the fact that a determination on the merits later precludes judgment in excess of $10,000 does not divest the Court of subject matter jurisdiction. 14 C. Wright & A. Miller, *Federal Practice and Procedure,* § 3702, at 381-83. This is not a case in which it was evident from the nature of the claim that damages could not exceed $10,000. This Court having jurisdiction, summary judgment will be entered in favor of the plaintiff for excess sums due within three years of the date suit was filed.

/s/ Shirley B. Jones
Shirley B. Jones
United States District Judge

Dated: January 29, 1981

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

DAVID F. MURPHY,	:	
	:	
Plaintiff	:	
	:	
vs.	:	**Civil Action**
	:	**No. J-79-1500**
EDWARD W. MINTE COMPANY INC. and TRAVELERS INSURANCE COMPANY,	:	
	:	
Defendants	:	

ORDER

For the reasons contained in the foregoing Memorandum, it is this 29 day of January, 1981, by the United States District Court for the District of Maryland hereby ORDERED:

1) That plaintiff's motion for partial summary judgment be, and the same hereby is, GRANTED in part and DENIED in part;

2) That defendant's motion for summary judgment be, and the same hereby is, GRANTED in part, and DENIED in part;

3) That counsel are directed to submit an Order by February 17, 1981, setting forth the amount to which plaintiff is entitled under this Court's ruling.

4) That the Clerk of Court shall mail copies of this Memorandum and Order to all counsel of record.

/s/ Shirley B. Jones
Shirley B. Jones
United States District Judge

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 81-1206

DAVID F. MURPHY,

Appellee,

v.

EDWARD W. MINTE COMPANY, INC., AND TRAVELERS INSURANCE COMPANY,

Appellants.

Appeal from the United States Court for the District of Maryland, Shirley B. Jones, District Judge.

Argued: September 1, 1981 Decided: October 9, 1981

Before WINTER, Chief Judge, BUTZNER and SPROUSE, Circuit Judges.

Jeffrey W. Ochsman (Gerald Herz, Morris Kletzkin, Friedlander, Misler, Friedlander, Sloan & Herz on brief) for Appellants; Martin E. Gerel (Ashcraft & Gerel on brief) for Appellee.

PER CURIAM:

Edward W. Minte Company, Inc. and Travelers Insurance Company appeal from the summary judgment entered in favor of David F. Murphy in a diversity action against Minte, his employer, and Travelers, Minte's insurer, for additional insurance benefits under a collective bargaining agreement and an insurance contract. The judgment is affirmed.

Murphy was employed by Minte and was totally and permanently disabled by an accident injury received in 1963 during the course of his employment in the State of Maryland. The collective bargaining agreement between Murphy's union[1] and Minte required Minte, a multi-state employer, to provide all its union employees with the level of benefits they would receive under the District of Columbia workmen's compensation law, regardless of where their injury occurred. The agreement specifically provided, in part:

> *Section 1.* The Contractor shall carry Workmen's Compensation Insurance and such other insurance as may be required by the laws of the District of Columbia and the States within the geographical jurisdiction of [the union] . . . . The Contractor further agrees to carry adequate liability and compensation insurance conditioned so that each journeyman and apprentice shall receive benefits upon the basis and at the same rate as provided under the District of Columbia Workmen's Compensation Commission, irrespective of where the injury or death occurs.

---

[1] Local 890 of the International Brotherhood of Painters and Allied Trades.

> *Section 2.* The Contractor agrees to furnish proof upon request. . . that he is in compliance with all laws governing liability to his employees, Workmen's Compensation, and any other laws now in effect or which may be enacted in the future for the benefit and protection of labor.

At the time of Murphy's 1963 injury, Travelers provided this workmen's compensation coverage for Minte. The insurance contract between Travelers and Minte provided in pertinent part:

> In consideration of the premium provided for herein, it is agreed that if any employee of this insured who is a member of the [Union] . . . is injured in the state of Virginia or Maryland . . . which would have rendered the insured liable for compensation payments under the District of Columbia Workmen's Compensation law had the accident been sustained in the District of Columbia, the company agrees to voluntarily pay on behalf of the insured the difference between the compensation benefits. . . as provided by the [State] Compensation Law and such compensation benefits under the District of Columbia Workmen's Compensation Law.

Murphy has received workmen's compensation benefits under Maryland law since his injury, and he also has received additional benefits of $70.00 per week under the collective bargaining agreement and the insurance contract, since the 1963 District of Columbia benefits were $70.00 per week higher than Maryland benefits. In 1972, the applicable law governing workmen's compensation benefits in the District of Columbia – the Longshoremen's and Harbor Workers' Compensation Act

(LHWCA) – was amended by Congress, and the benefits for totally disabled workers were substantially increased. Murphy claims he is entitled to the increase provided by the 1972 amendments, but Minte and Travelers disagree. They admit they are liable for additional benefits under the 1963 LHWCA provisions, but deny liability based on the 1972 amendments. Travelers and Minte contend that the 1972 amendments of the LHWCA were neither a part of, nor applicable to, the private collective bargaining agreement and insurance contract. They also argue that imposing liability for the increased benefits would, depending on whether the 1972 amendments are regarded as federal or state action, constitute either a deprivation of property without due process of law or a violation of Art. 1, § 10 of the United States Constitution, which prohibits any state from impairing the obligation of contract.

Finally, the appellants suggest that since the Department of Labor assumes part of the cost of the additional benefits provided by the 1972 amendments when an injury occurs in the District of Columbia, Travelers and Minte, as private entities should not have to bear the full cost of additional benefits when an injury occurs in Maryland.

The district court, in a well-reasoned opinion, granted summary judgment for Murphy in principal part,[2] ruling that the collective bargaining agreement contemplated future changes in the law governing benefits in the District of Columbia, and that application of the 1972 LHWCA amendments to the contract was not unconstitutional. We agree and affirm on the opinion of the district court.

AFFIRMED.

---

[2]A portion of Murphy's claim was barred by Maryland's three year statute of limitations.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1206

DAVID F. MURPHY,

Appellee,

versus

EDWARD W. MINTE COMPANY, INC., ET AL,

Appellants.

FILED

ORDER

DEC 15 1981

WILLIAM K. SLATE, II
CLERK

Upon consideration of the appellants' petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Sprouse with the concurrence of Chief Judge Winter and Judge Butzner.

For the Court,

/s/ William K. Slate, II
CLERK

Opposition

Supreme Court, U.S.
FILED
APR 12 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1697

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

EDWARD W. MINTE COMPANY, INC.,
and
TRAVELERS INSURANCE COMPANY,
Petitioners,

v.

DAVID F. MURPHY
Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a constitutional question meriting the granting of certiorari exists in a case where the only issue involved is the intention of the parties to a private contract as to the effect of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act.

2. Does there exist a conflict between this Court and/or several United States Circuit Courts of Appeal as to whether the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act may be given retrospective application, if such application does not offend due process nor constitute an impairment of contract.

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IN THE

Supreme Court of the United States

October Term, 1981

No. 81-1697

EDWARD W. MINTE COMPANY, INC.,

and

TRAVELERS INSURANCE COMPANY,

Petitioners,

v.

DAVID F. MURPHY,

Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STATEMENT OF THE CASE

This case originated as a suit by the Respondent, an employee of the Petitioner, Edward W. Minte, Company, Inc., upon an insurance contract issued by the Petitioner, Travelers Insurance Company. The insurance policy was obtained by Petitioner/Minte in fulfillment of an obligation created by a collective bargaining contract between Petitioner/Minte and the Respondent's union, The International Brotherhood of Painters and Allied Trades Local No. 890. The collective bargaining contract required that Petitioner/Minte purchase insurance condi-

tioned so that its employees (who are members of the aforesaid union), injured while working outside of the District of Columbia will receive "excess" benefits sufficient to boost their compensation to the level provided by the District of Columbia Workmen's Compensation Act (Federal Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq.). Article IX of the collective bargaining contract provides, in pertinent part:

> Section 1. The Contractor shall carry Workmen's Compensation Insurance and such other insurance as may be required by the laws of the District of Columbia and the States within the geographical jurisdiction of Painters and Glaziers District Council No. 51 and shall furnish proof thereof to the representatives of the above-named District Council No. 51. The Contractor further agrees to carry adequate liability and compensation insurance conditioned so that each journeyman and apprentice shall receive benefits upon the basis and at the same rate as provided under the District of Columbia Workmen's Compensation Commission, irrespective of where the injury or death occurs.
>
> Section 2. The Contractor agrees to furnish proof upon request to District Council No. 51 and its representatives that he is in compliance with all laws governing liability to his employees, Workmen's Compensation, and any other laws now in effect or which may be enacted in the future for the benefit and protection of labor. The Contractor also agrees upon request to furnish proof to District Council No. 51 as to his contributions to the Painters Trust Fund of Washington, D.C., and Vicinity and to the Joint Trade Board as required by this Agreement.

An insurance policy was purchased by Petitioner/Minte from Petitioner/Travelers in compliance with the quoted collective bargaining contract language. It is that insurance policy upon which suit was originally brought and upon which partial summary judgment was granted by the United States District Court

for the District of Maryland (Pet. App. 1a-11a) and affirmed by the United States Court of Appeals for the Fourth Circuit (Pet. App. 12a-15a). A petition for rehearing en banc was also denied by the Fourth Circuit (Pet. App. 16a).

The Petitioners have never disputed that the Respondent was injured in Maryland, was covered by the Maryland Workmen's Compensation Act (Md. Ann. Code, Art. 101) and received awards from the Maryland Workmen's Compensation Commission requiring the defendant to pay benefits for permanent total disability to the body as a whole under Maryland law. Md. Ann. Code, Art. 101, § 36. The Maryland award further found that plaintiff's average weekly wage at the time of his injury was $167.00. No appeal was taken from these findings. Md. Ann. Code, Art. 101, § 56. Nor have the Petitioners disputed that the Federal Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., was amended in 1972 by P.L. 92-576 which was passed by Congress for the purpose of increasing the rate of compensation for employees who were already, or were to later become permanently and totally disabled, in this case the Respondent.

Petitioners have refused to pay benefits which would supplement the Respondent's Maryland compensation benefits to the level provided for by the Federal Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 on the grounds that the amendments relieve them of any liability for the required periodic adjustments in the amount of benefits the injured employee is entitled to receive. The Petitioners contend that such responsibility has been placed by the amendments in the laps of the United States Government and the special fund. The Motion for Partial Summary Judgment constituted a ruling from the District Court that the Petitioners are liable to the Respondent for the difference between Respondent's Maryland compensation benefits and the District of Columbia benefits pursuant to the 1972 amendments for permanent total disability.

I

THE CONTROVERSY IN THE CASE AT BAR INVOLVES A PRIVATE CONTRACT AND DOES NOT EVOKE ANY PRINCIPLES OR QUESTIONS OF CONSTITUTIONAL LAW.

Petitioners begin their argument by stating that it is their contention that the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act (hereinafter "LHWCA") were not contemplated, were not a part of, and were not incorporated into the private contracts entered into between themselves and the Respondent's Union in 1963 (Pet. 11-14). While such a statement is followed by a discussion as to the basic principles of constitutional law and statutory construction, there does not appear to be any justification as to precisely why this Court should become involved in a private contract dispute. All questions of intention have been decided, by way of summary judgment, by the United States District Court for the District of Maryland and by the United States Court of Appeals for the Fourth Circuit per curiam.

The Fourth Circuit denied a petition for rehearing en banc without any of the judges requesting a poll as to the suggestion for rehearing (Pet. App. 16a).

Even assuming, arguendo, that this Court should become involved in a dispute between private parties as to the construction of a contract and as to the parties' intentions as they existed almost two decades ago, all such questions are readily answerable by the clear language of the contracts themselves and the governing statutory provisions.

The District of Columbia has adopted the benefit provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. into its workmen's compensation law, via D.C. § 36-501, in such a way that D.C. benefits automatically increase when Congress raises benefits under the LHWCA. This is evident when one reads D.C. Code Ann. Sec. 36-501, which states:

> The provisions of Chapter 18 of Title 33, U.S. Code [the LHWCA], *including all amendments that may hereafter be made thereto,* shall apply in respect to the injury or death of an employee or employer carrying on any employment in the District of Columbia. . . . (Emphasis supplied).

Thus, the collective bargaining agreement's call for the application of the District of Columbia rate of benefits to injured employees, such as the Respondent in the case at bar, in and of itself provides for the incorporation of any future changes in the LHWCA, such as the 1972 amendments to § 910(h), given D.C. Code 36-501's language referred to above. However, such an issue need not even be addressed in the present case inasmuch as here the parties themselves went a step further when they explicitly dealt with such a contingency. The collective bargaining agreement entered into between the Respondent's Union and the Petitioner/Employer stated in Article IX, entitled "Compliance With Laws and Regulations":

> Section 1. The Contractor shall carry Compensation Insurance and such other insurance as may be required by the laws of the District of Columbia and the States within the geographical jurisdiction of Painters and Glaziers District Council No. 51 and shall furnish proof thereof to the representatives of the above-named District Council No. 51. The Contractor further agrees to carry adequate liability and compensation insurance conditioned so that each journeyman and apprentice shall receive benefits upon the basis and at the same rate as provided under the District of Columbia Workmen's Compensation Commission, irrespective of where the injury or death occurs.
>
> Section 2. The Contractor agrees to furnish proof upon request to District Council No. 51 and its representatives that he is in compliance with all laws governing liability to his employees, Workmen's Compensation, *and any other laws now in effect or which may be enacted in the future* for the benefit and protection of labor. The Contractor also agrees

> upon request to furnish proof to District Council No. 51 as to his contributions to the Painters Trust Fund of Washington, D.C., and Vicinity and to the Joint Trade Board as required by this Agreement. (Emphasis added).

Thus, the Respondent/Employer expressly agreed in Section 2 to comply with all workmen's compensation laws "now in effect or which may be enacted in the future for the benefit and protection of labor." It is therefore clear that the agreement encompassed the possibility that the law could change and that such changes were to be incorporated into the contract. Therefore, as the District Court and Fourth Circuit Court of Appeals held, this case may be decided without reaching the question of whether Section 910(h) of the 1972 amendments was intended by Congress to be retroactive in its application. Where the intent of the parties is expressed in clear and unambiguous language, there is no need or room for construction or interpretation and the parties to the contract must be presumed to have intended what they expressed in the contracts. *Devereux v. Berger,* 253 Md. 264, 252 A.2d 469 (1969). Moreover, the Petitioner/Employer sought, by way of an insurance contract, indemnity from the Petitioner/Insurer against the risk it accepted in the collective bargaining agreement. The insurance contract makes special reference to the fact that the insurer recognized that it was indemnifying the Petitioner/Employer from financial loss occasioned by the collective bargaining agreement.

Nor can the fact that the insurance and Union contracts were for specific periods of time, from 1963 to 1964, while the amendments raising the maximum weekly benefits to an injured employee were not put into effect until 1972 elevate the issue involved in this case to one of constitutional import. The obligations the Petitioners undertook pursuant to the contracts run for the duration of the disability of any of the third party beneficiaries covered by the contract, in this case the Respondent. Petitioners' liability therefore exists well beyond the one year insurance contract or the three year Union contract, and, more importantly beyond the 1972 amendments.

Furthermore, although the Petitioners correctly state the general rule of law that constitutional and statutorial provisions which exist at the time a contract is made become a part of the contract (Pet. 14), the facts of the case at bar are consistent with this proposition. Here a contract was entered into which set up long term duties and obligations going well beyond the year 1963, including the payment of benefits according to whatever the rate of such benefits might be in the District of Columbia in the future. In addition, this Court denied certiorari in a case which was decided by the Fourth Circuit Court of Appeals and involved the precise argument now raised by the Petitioners. *Penn National Mutual Casualty Ins. Co. v. Spence,* 591 F.2d 985 (4th Cir.) *cert. denied,* 444 U.S. 963 (1979), was a case involving the 1972 amendments to the death benefits provision of the LHWCA. The Fourth Circuit stated that once it is admitted that the insurer was the employer's insurance carrier at the time of the employee's injury it necessarily follows that such insurer is subject to all liabilities attaching to the employer on account of the injury by way of compensation to the employee and that it was immaterial with respect to its liability for benefits arising out of the injury that its policy was terminated in 1971, prior to the injured employee's death in 1972. *Id.* at 987. In doing so the Court was merely enforcing an obligation which the insurer had assumed when it issued its policy.

II

THE RULING OF THE LOWER COURTS THAT SECTION 910(H) OF THE LHWCA IS TO BE GIVEN RETROSPECTIVE APPLICATION WAS IN ACCORDANCE WITH PRECEDENT LAID DOWN IN EVERY CASE ON THE SUBJECT.

Notwithstanding the fact that the contract between the parties explicitly addresses the issue of the retrospective application of any future amendments to the LHWCA, i.e., the 1972 amendments, the Petitioners seek to circumvent the plain meaning of the contract by contending that the issue of retroactivity is unresolved and that inasmuch as one or two other portions of

the 1972 amendments were not intended to apply retrospectively, a conflict exists between the Circuits as to the retroactivity of Section 910 (Pet. 14-20).

While it is the Respondent's position that there does not exist an issue as to retroactive application inasmuch as the Respondent was receiving benefits even prior to the 1972 amendments, such issue is now addressed solely due to the fact that it was raised in the Petitioners' brief (Pet. 14-20). It is worthy to note that the United States Court of Appeals likewise did not find it necessary to even discuss the issue of retroactivity.

Even assuming, therefore, that the contract between the parties and the District of Columbia Workmen's Compensation Act were not controlling the Petitioners' argument is defective for several reasons. Unlike any one of the three cases referred to by the Petitioners (Pet. 14), the amended section involved in this case specifically states that it is to be afforded retrospective application.

> (A)n injury which resulted in permanent total disability or death which occurred prior to the date of enactment of this subsection shall be considered to have occurred on the day following such enactment date.

33 U.S.C. § 910(h)(3)

> Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries sustained after the date of enactment of this subsection shall be increased . . . .

33 U.S.C. § 910(f)

Thus, even if the language in the collective bargaining agreement which incorporates the laws "which may be enacted in the future" is disregarded, the statute itself gives the increased benefits provisions retrospective application. Where the intention of the Legislature to have a statute applied retrospectively is stated in express terms or is demonstrated by terms which permit no other meaning, such intention will be upheld. *Fullerton-*

Krueger Lumber Co. v. Northern P.R. Co., 266 U.S. 435 (1925).

Retroactive provisions in workmen's compensation statutes have long been held to be constitutional. With respect to various provisions of the 1972 amendments to the LHWCA such retrospective application has been given in *National Independent Coal v. Brennan*, 372 F. Supp. 16 (D.D.C.), *aff'd mem.*, 419 U.S. 955 (1974), *reh. denied*, 419, U.S. 1132 (1975); *Nacirema Operating Co. v. Lynn*, 577 F.2d 852 (3d Cir. 1978) *cert. denied*, 439 U.S. 1069 (1979); *Hastings v. Earth Satellite Corp.*, 628 F.2d 85 (D.C. Cir.) *cert. denied*, 449 U.S. 905 (1980); *American Stevedores, Inc. v. Salzano*, 538 F.2d 933 (2d Cir. 1976); *C & P Telephone Co. v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor*, 564 F.2d 503 (D.C. Cir. 1977); and most recently in *Travelers Ins. Co. v. Marshall*, 634 F.2d 843 (5th Cir. 1981).

In *Travelers Ins. Co. v. Marshall, supra*, the Fifth Circuit's analysis of the legislative intent behind the 1972 amendment repeal of Section 909 of the LHWCA was the same as that employed by the court of Appeals for the District of Columbia in *Hastings v. Earth Satellite Corp., supra* and in *Todd Shipyards Corp. v. Witthuhn*, 596 F.2d 899 (9th Cir. 1979). In *Hastings*, the Court stated that in passing upon the 1972 amendment's retroactivity they were obligated to follow the dictates of the Supreme Court in *Bradley v. School Board*, 416 U.S. 696 (1976). Thus, the Court in *Hastings* said:

> We are instructed to apply the amendment unless there is statutory direction or legislative history to the contrary or unless to do so would be manifestly unjust. (Citing, *Bradley v. School Board*, at 711).
>
> We find no congressional intention that the repeal not be applied retroactively. The statutory language, to be sure, does not specifically require retroactive application of the repeal. We think, though, that the absence of a provision prohibiting retroactivity is significant. Congress before 1972 had thrice amended

> the Act's benefit limitations. Each prior amendment was, by its terms, made inapplicable to injuries or deaths occurring before the date of enactment. The 1972 Congress, by its silence, deviated from the past practice of specifically providing for nonretroactivity.

Id. at 16. Likewise, the Fifth Circuit in *Travelers, supra,* citing *Witthuhn, supra,* stated: "We agree with the Ninth Circuit that where Congress meant to restrict the applicability of a particular provision of the 1972 amendments . . . it expressed its intentions through carefully constructed legislative history." *Id.* at 847.

In the case at bar, the Petitioners do not point to, nor has Congress given, any legislative intention that the 1972 amendments to Section 910(h) of the LHWCA were not to be applied retroactively. In fact, as noted above, Congress expressed the opposite view in the language of the amendment itself. Moreover, the LHWCA is to be construed with a view to its beneficient purposes, and any doubts are to be resolved in favor of the injured employee. *Vinson v. Einbinder,* 307 F.2d 387 (D.C. Cir. 1962), *cert. denied,* 372 U.S. 197 (1952); and *Friend v. Britton,* 220 F.2d 820 (D.C. Cir.), *cert. denied,* 350 U.S. 836 (1955). It must be borne in mind that the amendments involved here were passed by Congress for the purpose of increasing the rate of compensation for employees who were already permanently and totally disabled as well as for those who were to become permanently and totally disabled in the future.

Additionally, in discussing the issue of the retrospective application of the 1972 amendments involved in the present case (Pet. 14-20) the Petitioners fail to take cognizance of the fact that the amendment to § 910(h) involves a remedial change rather than altering of the substantive law. They refer to cases which have involved substantive changes in the Act, i.e., *Addison v. Bulk Food Carriers, Inc.*, 489 F.2d 1041 (1st Cir. 1974) (Pet. 14), in attempting to provide instances of retrospective effect being denied for the application of the LHWCA. They also point to sections where the legislative history clearly shows that

a retrospective effect was not intended. See, e.g., 33 U.S.C. § 905 and 118 Cong. Rec. 36382 (1972). As the United States Court of Appeals for the District of Columbia stated:

> Where Congress fails to make its intentions absolutely clear, courts are much more inclined to apply retroactively amendments directed at the remedy rather than changes in substantive rights. See *Cooper Stevedoring of Louisiana, Inc. v. Washington,* 556 F.2d 268, 271-73 (5th Cir. 1977). Retroactive modification of remedies normally harbors much less potential for mischief than retroactive changes in the principles of liability. Persons and employers must be able to base their conduct on what they believe the law to be. Retroactive creation of legal responsibilities or abolition of legal rights risks unfairness because the retroactive change confounds the expectations upon which persons acted.
>
> Retroactive modifications in remedy, on the other hand, often do not involve the same degree of unfairness. Such modifications do not transform a legal act into an illegal act, or render one responsible to safeguard someone previously thought to act at his peril. Modification of remedy merely adjusts the extent, or method of enforcement, of liability in instances in which the possibility of liability previously was known. For this reason, absent contrary direction from Congress, courts are more inclined to apply retroactively changes in remedies than changes in liability.

Hastings, supra, at 93. See, also *Sturges v. Carter,* 114 U.S. 511 (1885). Such is the situation in this case, where, similarly, no new legal rights or liabilities are being imposed on the Petitioners. In interpreting and applying the provisions of the LHWCA broad application is to be given to its statutory terms so as to accomplish the remedial aims of the Act. *Michigan Mutual Liability Co. v. Arrien,* 233 F. Supp. 496 (D.N.Y. 1964), *aff'd,* 344 F.2d 640 (2d. Cir.), *cert. denied,* 382 U.S. 835 (1965). Moreover, inasmuch as this chapter is remedial, where there is

doubt as to its application it should be resolved in favor of the injured employee. *Grain Handling Co. v. McManigal,* 23 F. Supp. 748 (W.D.N.Y. 1938), *aff'd,* 102 F.2d 464 (2d Cir.), *cert. denied,* 308 U.S. 570 (1939). Even if this was not the case, this court has set out the principle that legislation, especially that which deals with disability benefits, which readjusts the rights and burdens of parties is not unlawful solely because its effect is the imposition of a new duty or liability based on past acts. *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1 (1976).

Finally, a careful examination of *Hastings v. Earth Satellite Corporation,* 628 F.2d 85 (D.C. Cir.), *cert. denied,* 449 U.S. 905 (1980) demonstrates, contrary to Petitioners' suggestion (Pet. 17), that not only is the United States Court of Appeals for the Fourth Circuit's ruling in the instant case not in conflict with the holding of the United States Court of Appeals for the District of Columbia, but it is actually directly on point with that holding and its underlying rationale. Both Courts held that the respective sections involved in the actions were to be applied retrospectively. The Petitioners, however, attempt to distinguish *Hastings* so as to support their alternative contention that although the provisions of the LHWCA may be applied retroactively, the $70 weekly maximum compensation rate for disability as it existed under U.S.C. § 906(b) prior to 1972 should be maintained. Such an argument is faulty on several grounds and serves to conjure up only a "phantom issue."

The Court in *Hastings* ruled only with respect to the retroactivity of the $24,000 limit on the total amount of overall disability which could be paid to an individual who was permanently partially disabled. The Court did not expressly reach the issue of whether the limit of $70 in weekly payments of disability incurred prior to the 1972 amendment to the LHWCA should apply subsequent to the amendments enactment. The Court merely mentioned in a brief footnote that the parties had agreed that the $70 limitation would be applicable to the compensation award of that particular claimant, regardless of whether the $24,000 total limit is applied. *Id.* at 87. Such a footnote does not

constitute a specific holding on the issue of the retroactivity of the $70 weekly limit.

Even more important, however, is the fact that *Hastings* dealt with a different section of the LHWCA involving a different category of compensation than is involved in the case at bar. In *Hastings* the Court was interpreting Section 914(m) of the Act which addressed permanent partial disability benefits. Section 910(h), the crux of this case, refers only to permanent total disability and death benefits. In deciding whether to apply amended portions of a statute retrospectively such portions need not be treated as a whole, but rather may be analyzed separately. Thus, the Petitioners again raise an issue which is in no way relevant to the case at bar and is addressed below solely in response to its having been mentioned in Petitioners' brief.

The above distinction between the different sections is especially relevant when one considers that unlike the section regarding permanent partial disability in *Hastings, supra,* there did not exist a $24,000 limit, or any other maximum limit on the overall amount of compensation for permanent total disability or death benefits under § 910(h) which could be received prior to the 1972 amendments. Rather, an individual who was permanently and totally disabled would receive benefits for the rest of his life under § 910(h) even prior to the amendments of 1972. Thus, inasmuch as there did not exist a limit as to the duration of permanent total disability benefits prior to 1972, the increase in payments pursuant to the 1972 amendments to § 910(h) for such benefits could not have been meant to apply to anything other than the $70 limit. Thus, even if one is willing to indulge in the notion that *Hastings* stands for the subsidiary principle that the limit of $70 should apply after 1972 to pre-1972 injuries it is inapposite to the case at bar. This is supported by logic as well as by the precise wording of § 910(h)(3) which, as noted above, specifically states that pre-1972 injuries which result in permanent total disability or death shall be treated as if they occurred after 1972, i.e., after the $70 limit was removed.

III

INASMUCH AS THE 1972 AMENDMENTS WERE PASSED PURSUANT TO CONGRESS' CLEAR AUTHORITY TO ENACT LEGISLATION IN THIS AREA AND THAT THE PARTIES SPECIFICALLY PROVIDED BY CONTRACT FOR ANY FUTURE AMENDMENTS THE LOWER COURTS WERE CORRECT IN HOLDING THAT THERE DOES NOT EXIST AN ISSUE AS TO IMPAIRMENT OF CONTRACTS.

The third possible justification which the Petitioners advance in support of their petition for certiorari is the issue of whether the retrospective application of Section 910(h) impairs the contracts entered into so as to offend due process. In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) this Court stated that a Due Process argument in such a context is without merit. This holding was reiterated when raised with respect to the retrospective application of the 1972 amendments by the United States Court of Appeals for the Second Circuit in *American Stevedores, Inc. v. Salzano*, 538 F.2d 933 (2d Cir. 1976), the United States Court of Appeals for the District of Columbia Circuit in *Hastings v. Earth Satellite, supra*, and now by the Fourth Circuit in the present action.

In arguing that there is a constitutional impairment of contracts issue involved in this case (Pet. 10-17) the Petitioners overlook the glaring fact that the 1972 amendments to the LHWCA, like the original District of Columbia Code § 36-501, was an act of Congress and thus immune from the impairment of contracts clause. The Federal Constitution's prohibition against the obligation of contracts by its very language, is only a limitation on the powers of the states. *Century Arms, Inc. v. Kennedy*, 323 F. Supp. 1002 (D. Vt. 1969); *aff'd* 449 F.2d 1306 (2d Cir.); *reh. den.* 405 U.S. 1065 (1971). Article 1, § 10 does not prohibit Congress, when acting within the scope of its powers, to enact laws which may operate to impair the obligation of contracts. *Norman v. Baltimore & O.R. Co.*, 294 U.S. 240 (1935); *Continental Illinois Nat. Bank & Trust Co. v. Chicago R.I. & P.R. Co.*, 294 U.S. 648 (1935).

The enactment of the LHWCA is a valid exercise of the constitutional authority of Congress and the extension of provisions to employees in the District of Columbia is a valid exercise of the power of Congress to provide for the general welfare of the citizens of the District. *Coates v. Potomac Electric Power Co.*, 95 F. Supp. 779 (D. D.C. 1951). The District of Columbia exists by virtue of Article 1, § 8 of the Constitution under which Congress has been given complete jurisdiction over the District of Columbia. *Atlantic Cleaners & Dryers v. United States*, 286 U.S. 427 (1932). It has thus been held that the power of Congress under Article 1, § 8, cl. 17 of the Constitution to exercise exclusive legislation in all cases whatsoever over the District of Columbia is plenary, meaning that Congress may apply its statutes of otherwise nationwide application to the District of Columbia as well as exercising all of the police and regulatory powers which a state legislature would normally have. *Palmore v. United States*, 411 U.S. 389 (1973) *overruled on other grounds, Delaware v. Prouse*, 440 U.S. 648 (1979). This may be done without being in violation of Article 1, § 10 of the Constitution. The intent is clear that Congress, in enacting national legislation, is not to be circumscribed due to the tangential and remote effect such legislation might have on the District of Columbia, for as Petitioners readily concede, Congress is simply not prohibited from impairing a contract obligation.

Therefore, given the fact that the contracts deal with a subject matter that falls within the constitutional authority of Congress, the principles enunciated by the Petitioners cannot be invoked in this case. *Norman v. Baltimore & O.R. Co., supra.* In view of this the many cases cited by the Petitioners as examples of violations of Article 1, § 10 are wholly irrelevant to the case at bar inasmuch as they involve action taken by state legislatures (Pet 22-26).

Even assuming, arguendo, that the 1972 amendments are subject to scrutiny under the provisions of Article 1, § 10 of the Constitution, they nevertheless do not constitute a violation of that provision in that they do not destroy or impair any existing rights contained in the 1963 insurance contract. As mentioned

above, the collective bargaining agreement explicitly encompassed future amendments in the law and therefore any changes in the rate structure does not serve to frustrate the contract but, quite to the contrary, is actually an occurrence of a foreseen condition in the contract. Where the parties agree to be bound by subsequent amendments to an existing statute which is pertinent to the contract they formed, the passage of such an amendment will not constitute an impairment of the obligation of their contract. *United States Mortg. Co. v. Matthews,* 293 U.S. 232 (1934). Thus, while the Petitioners again correctly state the general principles of law as to statutes which impair rights under existing contracts, they fail to demonstrate how such principles are applicable to the case at bar. A statute does not necessarily impair the obligation of a contract merely because it affects its value either by making performance more difficult or expensive. *Curtis v. Whitney,* 80 U.S. 68 (1871); *Lapp v. Belvedere,* 184 A. 837, 116 N.J. 563 (1936).

Further, even if one is willing to proceed with such an argument a step further and engage in the assumption that the contract involved in this case did not contemplate a retrospective increase in the benefits under the LHWCA, the contention made by the Petitioners that the 1972 amendments violate either the Fourteenth or the Fifth Amendments' due process clause still does not reach the level of a tenable argument necessitating review by this Court. The 1972 amendments to the LHWCA have been challenged directly on impairment of contract/due process grounds by employers and their compensation insurance carriers on numerous occasions, yet the constitutionality of the various provisions has been upheld by each of the federal courts which have ruled in this area. *American Stevedores, Inc. v. Salzano, supra; Nacirema Operating Co. v. Lynn,* 577 F.2d 852 (3rd Cir. 1978), *cert. denied,* 439 U.S. 1069 (1979); *Norfolk, Baltimore & Carolina Lines, Inc. v. Director, Office of Workers' Compensation Programs,* 339 F.2d 378 (4th Cir. 1976), *cert. denied,* 429 U.S. 1078 (1977); *Todd Shipyard Corp. v. Witthuhn,* 596 F.2d 899 (9th Cir. 1979); and *State Ins. Fund v. Pesce,* 548 F.2d 1112 (2d Cir. 1977).

This Court has already expressly addressed the issue which the Petitioners now raise. In *Usery v. Turner Elkhorn Mining Co., supra,* the Court wrote:

> It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. See, e.g., *Ferguson v. Skrupa,* 372 U.S. 726 (1963); *Williamson v. Lee Optical Co.,* 348 U.S. 483, 487-88 (1955). And this court long ago upheld against due process attack the competence of Congress to allocate the interlocking economic rights and duties of employers and employees upon workmen's compensation principles analogous to those enacted here, regardless of contravening arrangements between employer and employee. *New York Central R. Co. v. White,* 243 U.S. 188 (1917); see also, *Philadelphia, B. & W. R. Co. v. Schubert,* 224 U.S. 603 (1912).

428 U.S. 1, 15 (1976). The Court went on in *Usery* to lay down a foreseeability test for determining whether retrospective application is to be given in a situation such as the one now before this court. *Id.* at 17. The parties here, like those in *Usery* clearly foresaw that the level of benefits available under the LHWCA might increase. Indeed, Section 908 governing compensation for disability had actually been amended on five different occasions since its enactment in 1927: i) May 26, 1934 c. 354, §§ 2, 3, 48 stat. 806; ii) June 25, 1938 c. 685, §§ 4, 5, 52 stat. 1165; iii) June 24, 1948 c. 623, v. § 2, 62 stat. 602; iv) July 26, 1956 c. 735, §§ 2, 3 70 stat. 655; v) Oct. 27, 1972 Pub. L 92-576, §§ 5(c), 7, 9, 20(a), 86 stat. 1253, 1255, 1257, 1264). In addition, Section 906 governing the maximum and minimum amounts of compensation, and upon which the Petitioners base their claim of a $70 maximum payment limit, had been amended three times in only a fifteen year period prior to the collective bargaining agreement and insurance contract in 1963. (i) Act of 'une 24, 1948 c. 623,

§ 5, 62 stat. 602, 603; ii) Act of July 26, 1956 c. 735, § 5, 70 stat. 654, 664; iii) Act of July 14, 1961 Pub. L. 87-87, 75 stat. 203). Thus, the parties must be deemed to have foreseen the possibility of future amendments to the LHWCA being enacted and under the standard set out in *Usery* the Petitioners claim that there may have been a Due Process violation falls under its own weight.

IV

THE LOWER COURTS CORRECTLY RULED THAT THE BENEFITS TO WHICH THE APPELLEE IS ENTITLED ARE NOT THE RESPONSIBILITY OF THE FEDERAL GOVERNMENT BUT RATHER OF THE PARTIES WHO ARE CONTRACTUALLY BOUND TO PROVIDE SUCH DISABILITY PAYMENTS.

As a final argument in support of their petition for writ of certiorari the Petitioners argue that the 1972 amendments were unconstitutionally applied in this instance inasmuch as they would not have been responsible for the adjustments in benefits had the Respondent's workmen's compensation claim been brought in the District of Columbia (Pet. 27-29). While hypothetically this may be true, the facts here clearly indicate that the claim was not brought in the District of Columbia but rather was entirely a Maryland compensation claim subject to all of the Maryland Workmen's compensation laws. It deviated only in that the parties expressly provided, by way of contract, that an employee injured in Maryland would be paid additional benefits so as to bring his award up to the level of benefits an employee injured in the District of Columbia would receive.

The United States District Court for the District of Maryland has on numerous occasions, involving similar excess agreements and insurance contracts as exist here, addressed the argument that is now put forth by the Petitioners. On each occasion the Court has held that the proper interpretation of the insurance contract is *not* that the insurer and employer be bound to pay excess benefits only upon a showing of *actual eligibility* for

workmen's compensation *under the Federal act* (emphasis supplied). Rather, in each instance the Defendants were held to be bound, as a matter of law, simply for the difference in the rate of benefits. See, *Cox v. American Store Equipment Corp.*, 283 F. Supp. 390 (D. Md. 1968); *Sharp v. Liberty Mutual Insurance Co.*, 46 F. Supp. 104 (D. Md. 1968); *Rawlings v. Liberty Mutual Insurance Co.*, C.A. No. HM-78-2130 (D. Md. May 19, 1979); *Messer v. Industrial Indemnity Co. and Bechtel Corp.*, C.A. No. M-78-1577 (D. Md. March 5, 1980); *Hoppa v. Liberty Mutual Insurance Co.*, C.A. No. JH-80-565 (D. Md. November 12, 1980); *Wilson v. Catalytic Inc. and Liberty Mutual Ins. Co.*, C.A. No. J-79-2037 (D. Md. April 6, 1981). As the Court reasoned in each of these cases, there is nothing to indicate that the parties to the collective bargaining agreement intended the wasteful result that workers injured outside of the District of Columbia who have had their claims adjudicated in the appropriate jurisdiction where they were injured, i.e., Maryland, and who are to be paid the District of Columbia's compensation rate of benefits would be required to twice litigate their compensation claims. The Fourth Circuit was correct in following such reasoning.

The Petitioners' argument that any increased compensation should be paid to the Respondent out of a special fund set up by the Department of Labor to partially cover the increases under the 1972 amendments is likewise without merit. 33 U.S.C. § 910(h)(2). The Petitioners' claim, as stated above, is not governed by the District of Columbia's workmen's compensation law, but rather, Maryland workmen's compensation law controls and funds set up under the LHWCA cannot be appropriated by a Maryland administrative or judicial tribunal. It is only the rate of benefits of the District of Columbia which the collective bargaining agreement requires be applied.

In *Nelson v. Victory Electric Works, Inc.*, 338 F.2d 994 (4th Cir. 1964), *affirming*, 227 F. Supp. 404 the United States Court of Appeals for the Fourth Circuit stated:

> [U]nder the contract, the parties have accepted Maryland administration and Maryland interpretation of her workmen's compensation acts and their application, the contract having only the effect of requiring supplemental payments to bring the Maryland *scale* up to that of the District of Columbia when the Maryland *scale* is less. . . . (Emphasis supplied).

Finally, the Petitioners would have this Court impose liability on the Federal Government and the Department of Labor's Special Fund, entities which are neither parties in this overall case nor were parties to the contracts created. If the Petitioners genuinely intended to try the issue of whether their contract liability could be transferred to the Government then they should have impleaded the Government initially. They did not do this for the sole reason that the Government cannot incur the liability stemming from a private contract between the Petitioners and the Respondent's Union. There is no theory of contract law which enables two private citizens to contract with each other and thereby render the government liable. Moreover, there is no indication that Congress was even aware of the excess benefits insurance contracts, let alone that Congress intended to assume the Petitioners' obligations under contract outside of the District of Columbia's jurisdiction in workmen's compensation cases.

Therefore, while it is conceded that as a general rule the additional compensation or death benefits established by the 1972 amendments are payable by the Department of Labor, to so hold in the instant case would render a contract into which the parties entered nugatory and would relieve the Petitioners of a duty which they freely undertook as a result of a valid and enforceable collective bargaining agreement. As mentioned earlier, the insurance contract specifically noted that the burden to pay the difference in benefits was to be carried by the Petitioners. It provided, in pertinent part:

> In consideration of the premium provided for herein, it is agreed that if any employee of this insured who is

> a member of the [Union] . . . is injured in the state of Virginia or Maryland . . . which would have rendered the insured liable for compensation payments under the District of Columbia Workmen's Compensation law had the accident been sustained in the District of Columbia, the company agrees to voluntarily pay on behalf of the insured the difference between the compensation benefits . . . as provided by the [State] Compensation Law and such compensation benefits under the District of Columbia Workmen's Compensation Law.

Courts will construe a contract in such a way as to accomplish the intention of the parties, rather than to overthrow it by any strained construction. *Rogan v. Baltimore & O.R. Co.*, 52 A.2d 261, 188 Md. 44 (1947). The parties in this case expressly stated in the agreement that an injured employee would receive additional compensation in Maryland and Virginia "equal to that received in the District of Columbia." It is well settled that where the parties to a contract have expressed their intention in clear and definite terms it must be construed according to the true meaning of the words used and a court will not, under the guise of construction, rewrite a contract which the parties have made. *Strickler Engineering Corp. v. Seminar, Inc.*, 210 Md. 93, 122 A.2d 563 (1956); *Kastern Const. Co., Inc. v. Rod Enterprises, Inc.*, 268 Md. 318, 301 A.2d 12 (1973).

CONCLUSION

Wherefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

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